

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROSSCO HOLDINGS INC. et al.,

Plaintiffs and Respondents,

v.

BANK OF AMERICA, etc., et al.,

Defendants and Appellants.

B189963

(Los Angeles County
Super. Ct. No. BC308813)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 19, 2007 be modified as follows:

(1) On page 11, line 7, a new footnote (number 16) is to be added after the sentence, “The Bank filed a timely notice of appeal.” The text of the footnote is as follows:

Code of Civil Procedure section 1294, subdivision (c), renders appealable “[a]n order vacating an [arbitration] award unless a rehearing in arbitration is ordered.”

As no rehearing was ordered, the order vacating the award is appealable. While

it is possible that a new arbitration hearing may subsequently be ordered in this case, Ross provides no authority for the proposition that the question of the appealability of the instant order vacating the arbitration award turns on a possible future order of the trial court.

All remaining footnotes are to be renumbered accordingly.

(2) On page 19, lines 3-8, the first two sentences of the paragraph are deleted and replaced by the following language:

We note that, at the time Judge House granted the motion to vacate the arbitration award, Ross had pending a motion to file a first amended complaint – one which omits references to several of the contracts on which Ross initially brought suit. Judge House declined to rule on the motion, stating that it was “premature” to consider the issue, as, if there is a subsequent arbitration, it may be that the issue of an amendment to the pleadings would be a matter for the arbitrator to decide. After Judge House granted the motion to vacate the arbitration award, Ross filed his first amended complaint without having been granted leave to do so.

(3) On page 20, the text of current footnote 21 is to be deleted in its entirety and replaced with the following language:

At oral argument on the appeal, we asked the parties whether Judge Williams had any effect on the arbitration at all, beyond ordering that it take place. Ross has filed supplemental briefing indicating that the Bank submitted the transcripts of the two hearings before Judge Williams to the arbitrators, which placed before

the arbitrators Judge Williams's opinions on whether New York law applied (an issue on which Ross prevailed, by agreement of the parties, in the arbitration), whether the contract was unconscionable, and whether the matter should be arbitrated. There is no indication in the record before us that the arbitrators were *influenced* by Judge Williams's opinion on any matter other than the arbitrability of the dispute. As the determination of arbitrability is a purely judicial task, the arbitrators were correct to yield to Judge Williams on this point. (*Malek v. Blue Cross of California, supra*, 121 Cal.App.4th at p. 56.) It appears that we cannot determine whether the arbitration was tainted as a matter of law, and we therefore remand to the trial court to resolve the matter in the first instance.

There is no change in the judgment.

Ross's petition for rehearing is denied in all other respects.